

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 02-0606  
SALES AND USE TAX  
FOR TAX PERIODS: 1998-2000**

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**Issues**

**1. Sales and Use Tax- Free Distribution Newspapers**

**Authority:** IC 6-8.1-5-1 (b), IC 6-2.5-3-2 (a), IC 6-2.5-5-31.

The taxpayer protests the assessment of use tax on publications that it contends qualify for exemption as free distribution newspapers.

**2. Tax Administration-Penalty**

**Authority:** IC 6-8.1-10-2.1, 45 IAC 15-11-2.

The taxpayer protests the imposition of the ten percent (10%) penalty.

**Statement of Facts**

The taxpayer is a publishing company that publishes and distributes free-of-charge apartment listings for major metropolitan areas throughout the United States. In particular, the taxpayer publishes listings for several cities throughout Indiana wherein various real estate management companies place advertisements. Each advertisement contains detail information on the types of apartment available (within a defined region), features available at the apartment complex itself, square footage, amenities, and contact information for the corresponding management office. Pictures of the apartment and maps for locating the apartments are frequently provided. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest and penalty. The taxpayer protested and a hearing was held on the issues of use tax assessed on the taxpayer's publications and penalty. The taxpayer conceded that the racks used in the distribution of the publications were properly subject to the use tax.

**1. Sales and Use Tax- Free Distribution Newspapers**

### **Discussion**

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Pursuant to IC 6-2.5-3-2 (a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. The department assessed use tax on the taxpayer's cost of printing, labor and materials utilized in the production of the guides. The taxpayer argues that pursuant to IC 6-2.5-5-31(d), these items qualify for exemption because they are used in the production of a free distribution newspaper. The issue to be determined is whether the taxpayer's publication is a free distribution newspaper.

The Indiana Code defines a "free distribution newspaper" at IC 6-2.5.5.31 as follows:

(a) As used in this section, "free distribution newspaper" means any community newspaper, shopping paper, shoppers' consumer paper, penny-saver, shopping guide, town crier, dollar stretcher, or other similar publication which:

- (1) is distributed to the public on a community-wide basis, free of charge;
- (2) is published at stated intervals of at least once a month;
- (3) has continuity as to title and general nature of content from issue to issue;
- (4) does not constitute a book, either singly or when successive issues are put together;
- (5) contains advertisements from numerous unrelated advertisers in each issue;
- (6) contains news of general or community interest, community notices, or editorial commentary by different authors, in each issue; and
- (7) is not owned by, or under the control of, the owners or lessees of a shopping center, a merchant's association, or a business that sells property or services (other than advertising) whose advertisements for their sales of property or services constitute the predominant advertising in the publication.

(b) The term "free distribution newspaper" does not include mail order catalogs or other catalogs, advertising fliers, travel brochures, house organs, theater programs, telephone directories, restaurant guides, shopping center advertising sheets, and similar publications.

The department agrees that the taxpayer's publication meets many of the statutory requirements for classification as a free distribution newspaper. It is necessary, however, that the taxpayer's publication meet all the requirements. The statute requires that a free distribution newspaper contain "news of general or community interest, community notices, or editorial commentary by different authors, in each issue." The taxpayer argues that its publication meets this requirement by offering lists of Indianapolis phone numbers, a welcoming letter from the mayor, a moving

checklist, apartment locator maps, a guide on how to use the guide, and a welcoming letter from the president of the Apartment Association of Indiana.

The few cited items listed in a several hundred page publication do not meet the statutory standard. They do not contain information on recent events of general interest or notices of specific events in the near future. There are no articles setting out the opinions of the publication's editors. The publications do not give any community information that is not more fully and easily accessible in the local phone book. The publication is marketed to persons looking for apartments and they are the only persons likely to read it. Someone interested in specific community events of general interest or analysis of an issue of general concern would not choose to read this publication in lieu of others readily available in any market.

Of all the examples given in the statute, this publication most closely resembles restaurant guides. The statute specifically states that restaurant guides are not free distribution newspapers. Neither is this publication.

### **Finding**

The taxpayer's protest is denied.

## **2. Tax Administration-Penalty**

### **Discussion**

The taxpayer also protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Negligence is defined at 45 IAC 15-11-2(b) as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

Although they were clearly subject to the tax, the taxpayer failed to self assess and remit use tax on the racks used in the distribution of the taxpayer's publication. This breach of the taxpayer's duty to use the reasonable care expected of an ordinary taxpayer constituted negligence. Therefore the negligence penalty properly applies in this instance.

### **Finding**

The taxpayer's protest to the imposition of the penalty is denied.